IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**No. CP-22-CR-525-2015**
	:	
VANESSA LOWERY BROWN	:	

VANESSA LOWERY BROWN'S POST-SENTENCE MOTION

Vanessa Lowery Brown, by and through her undersigned counsel and pursuant to Pa. R. Crim. P. 720, respectfully moves this Honorable Court for an Order vacating her sentencing and entering a judgment of acquittal and/or arrest of judgment in her favor. In support of this motion, Ms. Lowery Brown states the following:

1. On November 30, 2018, the Honorable Scott A. Evans, an elected member of the Pennsylvania judiciary, described the investigation of Vanessa Lowery Brown as "troubling," maligned with "racial overtones," the effects of "porngate," a disparity in sophistication and culpability between the confidential informant and target, and items of governmental inducement that

validated early justifications of the Dauphin County District Attorney and Attorney General who separately declined prosecution.

2. Dauphin County's initial decision to decline prosecution was reported in March 2014. See Charles Thompson, PennLive.com, Mar. 17, 2014, http://www.pennlive.com/midstate/index.ssf/2014/03/dauphin_county_da_ed_marsicos.html. District Attorney Francis T. Chardo confirmed that the Attorney General "asked us to get involved if it was going to be viable." "Chardo said that he and [then District Attorney] Marsico decided the case would be too difficult to pick up for a variety of reasons, ranging from **the likelihood of a successful entrapment defense** to a **lack of consistent reports** that would make it difficult to pick up midstream." (Emphasis added). The Dauphin County District Attorney concluded this case should not proceed "based on the passage of time, the **way in which the investigation occurred** and the **way the case was documented**." Id.

3. For the reasons set forth in this Motion and others preserved during trial, the November 30, 2018 judgment of sentence must be vacated and a judgment of acquittal in favor of Ms. Lowery Brown should be entered.

I. ENTRAPMENT AS A MATTER OF LAW

4. On January 1, 2011, the Commonwealth of Pennsylvania admittedly had no basis to suspect that Vanessa Lowery Brown had ever violated the law. Indeed, she had not. At the time, Ms. Lowery Brown was at the end of an

improbable first term in the Pennsylvania House of Representatives as a member of the Democratic Black Caucus.

5. Like the 190th Legislative District that she represented, Ms. Lowery Brown was neither wealthy nor politically sophisticated. She was a single mother of a child with special needs. She had survived an abusive marriage, which – for a time – forced her and her son to a shelter. But she had turned her personal ordeal into a platform to connect and help others. Ms. Lowery Brown sought elected office as a voice for the problems "plaguing [her] community:"

> I didn't think that anyone who was sitting in the House of Representatives knew what it was like to come home and have a yellow sticker on your door where your water had been shut off or understood what it was like not to have heat . . . Or understand how hard it was with a child who was special needs . . . I wanted to go to Harrisburg to be that voice. I had no money, no political power. I just had a lot of will.

See Grand Jury Tr., Vanessa Lowery Brown, Dec. 5, 2014 at 8.

6. On New Year's Day 2011, Ms. Lowery Brown was introduced to Tyron B. Ali at a holiday party. Ali was, at that time, an unsupervised confidential informant working down exposure to life imprisonment and millions in fines. This immense criminal exposure resulted from more than 2000 crimes of deception aimed in part at a lunch program for underprivileged children and older

adults administered by the Pennsylvania Department of Education. Although the Commonwealth downplayed Ali's criminal conduct at trial, Chief Deputy Attorney General Frank Fina ("CDAG Fina") admitted at trial that Ali committed more than 300 forgeries against the Department of Education. There was additional uncontroverted evidence at trial that Ali also swindled hundreds of thousands of dollars from a mechanical engineering professor and a pharmaceutical executive through separate crimes of dishonesty and deceit.

7. Following his January 1, 2011 introduction to Ms. Lowery Brown, Ali made a material **misrepresentation** to his handler – Agent Claude Thomas – concerning Ms. Lowery Brown's financial circumstances. Specifically, Ali told Agent Thomas that Ms. Lowery Brown had been threatened by Representative Dwight Evans. According to Ali, Rep. Evans told Ms. Lowery Brown that he would run someone against her in the next election cycle if Ms. Lowery Brown did not pay Rep. Evans $100,000.

8. Ali's report to Agent Thomas was false. However, Ali's misrepresentation went unchecked, because the Commonwealth made no recording of the January 1, 2011 meeting nor any contemporaneous notes of the debrief with Ali.

9. Thus, based on the false statement of an unsupervised conman, the Commonwealth launched an investigation against an innocent person. The

Court likened this investigative scenario to the Commonwealth deputizing "Jack Dillinger" and setting him loose against "Jack Dawkins." Although the Court's point is obvious, unlike Dickens' "Jack Dawkins," Vanessa Lowery Brown was no pickpocket. She was an innocent member of the House Democratic Black Caucus.

10. Trial showed that during the ensuing investigation, Ali's conduct was not managed according to any protocol.

11. The Court granted a defense motion to compel and ordered the Pennsylvania Office of Attorney General to produce the protocol that governed its handling of Ali during the investigation in 2011. In response, the Commonwealth produced its directive, which was moved into evidence as Exhibit 105. The directive includes requirements meant to apply to all personnel of the Bureau of Criminal Investigation and Bureau of Narcotics Investigation and/or other State, Federal or local law enforcement personnel who may be assigned to work under the direction of BCI/BNI ("Bureau"). See Exhibit 105. "Each agent who utilizes and informant will comply with the procedures outlined in this Section. Regional Director/Supervisory Agents will implement the procedures outlined in this regulation and ensure compliance by all personnel under their command." See Exhibit 105.

12. In sections titled "Control of Informants," "Utilization of Informants," and "Debriefing of Informants," the directive confirms that prompt

and timely recordkeeping and reporting on informant contacts with investigatory targets are hallmark requirements in ethical control over informant activity. See Exhibit 105. Significantly, the directive recognizes that "failure in management of the informant constitutes, perhaps, the most obvious cause of serious integrity problems." See Id. (Emphasis added).

13. According to the Commonwealth at trial, however, the protocols and regulations embodied in the controlling directive did not apply to Agent Thomas. Since CDAG Fina pulled Agent Thomas into this investigation from the Attorney General's Education and Outreach division, the policies and procedures set forth in the directive were disregarded in toto in the management of Ali and investigation of Ms. Lowery Brown.

14. Indeed, Agent Thomas admitted he never prepared a report, memorandum or notes of interactions with Ali. Agent Thomas offered after-the-fact testimony at trial that he was "certain" that "more that 50% of the calls related to the investigation were recorded." Even if this were true – and it is not – it is parlous to a competent criminal investigation to record half of the investigation-related calls between an informant and his target. These considerations were especially true in this case where the informant was a sophisticated conman exposed to life in prison and the target was a person about whom there was not even a reasonable suspicion of criminal disposition.

15. Agent Thomas testified that he did not know anything about Ali's criminal conduct. Rather, Agent Thomas was wowed by Ali. Agent Thomas noted that Ali spoke multiple languages and was knowledgeable about Pennsylvania government and politics. Agent Thomas testified that he found Ali pleasant to deal with. Agent Thomas acknowledged spending fourteen plus hours a day (five days a week) with Ali from late 2010 through 2011. Agent Thomas claimed that he never inquired nor discovered the crimes with which Ali was charged.

16. Agent Thomas testified that Ali's pretextual cover was supposed to be that of a lobbyist for New York City banks and Ali was to offer cash to politicians in exchange for projects in their districts. The Commonwealth – acting through Ali, Agent Thomas and CDAG Fina – intended to establish the foregoing "test" for Ms. Lowery Brown and fellow members of the Democratic Black Caucus. Their theory was that these criteria would show Ms. Lowery Brown's predisposition to criminal conduct. The reality is that the tactics, pretext, and inducements changed dramatically once Ms. Lowery Brown passed the initial test.

17. Agent Thomas admitted at trial that he did not direct Ali to pose as a campaign advisor or political strategist or financial advisor or lawyer or personal advisor to Ms. Lowery Brown.

18. However, because Agent Thomas failed to manage, memorialize, or report on the conduct of Ali, Ali was licensed by the OAG to "freestyle." It was undisputed at trial that, shockingly, 97% of the telephone interactions between Ali and Ms. Lowery Brown were unrecorded, unmonitored, and unmemorialized.

19. If, as Agent Thomas testified, more than half of the calls "related to the investigation were recorded," what possibly could the rest of the more than two hundred contacts relate to? The calls occurred in the daytime and evening. Some occurred late in the evening. Some were lengthy. Many calls occurred on weekends.

20. Ali disregarded the "script" of posing as a banking lobbyist plying Ms. Lowery Brown with cash in exchange for projects in her district. Ali designed his own investigative criteria.

21. In a recorded lunch meeting on January 21, 2011, Ms. Lowery Brown corrected Ali's false statement that Rep. Evans had asked her $100,000. Ms. Lowery Brown confirmed that Rep. Evans said that Ms. Lowery Brown needed $100,000 in Ms. Lowery Brown's campaign account.

22. There is no evidence that Agent Thomas considered the fact that Rep. Evans had not actually demanded $100,000 from Ms. Lowery Brown. In

fact, there is no evidence that Ali made Agent Thomas aware of that fact or that Agent Thomas reported this to any supervisor.

23. Moreover, in a January 28, 2011 meeting that Ali requested at the Palm Restaurant in Philadelphia, Ali began the meeting by telling Ms. Lowery Brown "[y]ou look great . . . [a]s always," and then ordered his first of the two rocks glasses of Chivas Scotch that he would consume. (Tr. T-39, 2,4, Jan. 28, 2011). Ali then informed Ms. Lowery Brown that he had just advised another politician "to fire" a "chief of staff" who "doesn't know how to raise money." Although the Commonwealth's transcript listed Ms. Lowery Brown's response as "unintelligible," it was confirmed at trial that Ms. Lowery Brown answered the chiefs of staff "shouldn't be raising money." Id. at 15. Ali then offered that he could "certainly raise [ ] money for you. I'm not offering. I'm just telling you that we can." Id. at 17. When Ms. Lowery Brown asked what benefit Ali got, he responded, "[p]robably nothing." Id. at 18. Then Ali offered Ms. Lowery Brown 10% of the campaign funds that she had been hoping to raise at a cancelled fundraiser, but Ms. Lowery Brown returned the funds when she realized that the envelope contained cash. "Can you change that to a check . . . I feel more comfortable with a check." Id. at 22. Ali promised that "[n]ext time" he would bring a check. Id. In his next sentence, Ali gave improper legal advice to Ms. Lowery Brown: "Here's the thing. What goes on in your campaign financing

reports is essentially up to you. The biggest thing is whether or not you report it. . . You know, because [Pennsylvania is] not hard and fast." In response, Ms. Lowery Brown said "Here's my deal . . . I'm being very cautious . . . And I have been by-the-book all the way up to now . . . it's just not worth it." Id. at 22-23.

24. There is no evidence that Agent Thomas considered discontinuing the investigation of Ms. Lowery Brown when she rejected the cash. Nor is there any evidence that Agent Thomas reprimanded Ali for providing legal advice and serving as a political strategist. There is also no evidence that Agent Thomas reported any of these issues with CDAG Fina or any supervisor.

25. Instead, Ali continued to pursue Ms. Lowery Brown. The two had unrecorded telephone calls and at their next meeting on February 11, 2011, Ali:

a. Appealed to friendship with Ms. Lowery Brown. "I said oop. Do I owe her an apology? I felt we were friends . . . ." (Tr. T-47, 4, Feb. 11, 2011). Later, Ali said "I'm talking to you like a friend . . . you know because I see you as such . . . I'm even, even when I felt we had that little disconnect, I swear to you I was going to send you some flowers . . . ." Id. at 22-23.

b. Told Ms. Lowery Brown that he "care[d] about [her]," and counseled her to "put a team in place" to raise campaign funds, offered his help, and said "I could write one check and give you a hundred grand." Id. at 17-18.

c. Offered legal assistance again by volunteering to "call one of the principals directly" at Cozen O'Connor to address Ms. Lowery Brown's campaign debt. Id. at 19.

d. Assured Ms. Lowery Brown that "[e]verything will be fine," and then feigned interest in the medical care that Ms. Lowery Brown's son Alex obtained earlier in the day. Ms. Lowery Brown credited his interest and friendship as sincere, remarking about her son: "I just left him. He's a little groggy because of the medication . . . he's such a big baby. He's so happy for all the extra attention he's been getting (U/I) even though he's in pain he's very happy. He knows his mama loves him." Id.

e. Counseled Ms. Lowery Brown to "create room in her life for a fundraising strategist . . . somebody like me . . . Just tell me if you're going to give me the, the, the ability to be your strategist for that particular part of your life and we'll go." Id. at 39-40.

f. Over the next 3 months, Ali continued to function as a political strategist and personal advisor. He continued to feign romantic and personal interest in Ms. Lowery Brown and her child. He met with her on Valentine's Day (see Tr. T-49, Feb. 14, 2011); complimented her on her appearance (see, e.g., Tr. T-39, 2, Jan. 28, 2011; Tr. T-54, 2, 25, 44; Feb. 21, 2011; Tr. T-56, 21, Mar. 1, 2011; and reported on comments to third parties about his fondness for Ms. Lowery Brown.

26. During her testimony before the Grand Jury, Ms. Lowery Brown asserted that she thought Ali had her best interests at heart and that "she succumbed to the pressure" of raising money. "I don't even think I realized that I was succumbing to it. I think I justified it in my mind that I was doing the right thing for the right cause. But now that I look back, it was the wrong thing. It was wrong. I accept full responsibility for what I've done. I am sorry that you all even have to be inconvenienced in your life to be here to deal with this issue. I want to

be a honorable person. I don't want this to be my legacy, my life." Grand Jury Tr. 46:3-4; 49:7-50:2-12, December 5, 2015.

27. Where, as here, "the defense of entrapment has been properly raised, the trial court should determine the question a matter of law wherever there is no dispute as to the operative facts regarding the defense." Commonwealth v. Lucci, 662 A.2d 1, 3-4 (Pa. Super. 1995) (citations omitted). The test for entrapment requires an "evaluation of the police conduct, an objective test, to determine whether there is a substantial risk that the offense will be committed by those innocently disposed." Id. at 3.

28. The defense of entrapment is "aimed at deterring police wrongdoing . . . a sanction for overzealous and reprehensible police behavior comparable to the exclusionary rule. The focus of the defense is on what the police do and not on what kind of person the particular defendant is – whether he is innocent or predisposed to crime." Id. (citing Pa. Crim. Sugg. Std. Jury Instr., Subcommittee Note § 8.313 (1985)). Although entrapment "must be decided on a case-by-case basis, impermissible activity may include 'appeals to sympathy, friendship, the possibility of exorbitant gain and so forth.'" Id. at 8 (citing Commonwealth v. Thompson, 484 A.2d 159, 165 (Pa. Super. 1984)); see also Commonwealth v. Wright, 578 A.2d 51 (Pa. Super. 1990) (finding entrapment as a

matter of law where, as here, government agent offered friendship, service as a confidante, romantic or sexual interest, and romantic inducements).

29. Commonwealth v. Thompson, 484 A.2d 159 (Pa. Super. 1984), is instructive. In that case, a young, attractive undercover female police officer induced an older police officer to purchase drugs for her after eight meetings, significant socialization, and continued cajoling. 484 A.2d at 160-62. Based on these facts, the Superior Court found entrapment as a matter of law, writing:

> The Commonwealth, acting through Trooper Hammond, pursued a long term, persistent course of persuasion and inducement aimed at luring appellant into delivering marijuana to Hammond. The use of a young, blonde female to coax a middle age male, after months of kissing and socializing, into committing a minor crime is not police conduct which presents the "mere opportunity" to commit a crime. As this case clearly shows, opportunity and inducement are two separate consequences of police activity. The latter occurred here.

Id. at 166. In reaching this conclusion, the Court noted that it "cannot sanction methods of inducement such as this, which lure otherwise law-abiding citizens into crime." Id.

30. Similarly, in Commonwealth v. Wright, 578 A.2d 513 (Pa. Super. 1990), the Superior Court again found that the appellant had been entrapped as a matter of law into selling marijuana where an informant "feigned friendship with a [the defendant] in order to manipulate him into purchasing marijuana." 578

A.2d at 521-22. In reaching this conclusion, the Wright Court noted that it was "guided by our statements in Thompson where we acknowledged that impermissible police activity may include appeals to friendship." Id. The Court further wrote that the police, through the confidential informant, "induced [the defendant's] conduct by fabricating the stories [the confidential informant] told [the defendant]." Id. at 522.

31. Finally, in Commonwealth v. Lucci, the Superior Court again found entrapment as a matter of law by a preponderance of the evidence where a close friend, "appealing to the bonds of friendship" and the "sympathy engendered by the impending death of [the defendant's] mother," approached a recovering drug addict to induce him to sell drugs. 662 A.2d 1 (Pa. Super. 1995).

32. In this case, like in Thompson, Wright, and Lucci, the Commonwealth committed entrapment as a matter of law based on Ali's impermissible and continuing appeal to Mr. Lowery Brown's friendship and potential romantic interest. Indeed, the undisputed facts above demonstrate by a preponderance of the evidence that Ali presented on multiple occasions as a potential friend to Ms. Lowery Brown, purported to serve as her confidante, and offered exorbitant monies through campaign finance consulting and support. Moreover, Ali feigned romantic interest in Ms. Lowery Brown by, over the course of three months, meeting with her on Valentine's Day, complimenting her

appearance, and reporting to others his fondness for her. Perhaps most egregiously, Ali expressed personal interest in Ms. Lowery Brown's child with special needs.

33. The investigation of Ms. Lowery Brown actually presents a more compelling case for entrapment than Lucci, Thompson, and Wright, because Ali was granted carte blanche authority by the OAG to use whatever inducement he wished. Almost all of his interactions with Ms. Lowery Brown were unrecorded, and there were no protocols governing management of his cooperation. Ali modified Agent Thomas' direction to pose as a lobbyist by portraying himself as a lawyer, campaign strategist, political advisor, personal advisor and general confidante. To make matters worse, the legal and political advice that Ali offered to Ms. Lowery Brown was false and misleading.

34. The police conduct in this case constitutes entrapment as a matter of law, and Ms. Lowery Brown is entitled to judgment in her favor.

WHEREFORE, Vanessa Lowery Brown is entitled to have the judgment of sentence vacated and to a finding by this Honorable Court that she was entrapped as a matter of law.

II. VIOLATION OF EQUAL PROTECTION OF LAWS – JURY EXCLUSION

35. Vanessa Lowery Brown incorporates the allegations of paragraphs 1 through 34 as if set forth at length herein.

36. The Commonwealth denied Ms. Lowery Brown equal protection of the laws by putting her on trial before a jury from which members of her race were purposefully excluded. Batson v. Kentucky, 476 U.S. 79, 85, 106 S. Ct. 1712, 1716 (1986). "The Equal Protection Clause guarantees that the State will not exclude members of [her] race from the jury venire on account of race, or on the false assumption that members of [her] race as a group are not qualified to serve as jurors." Id. at 86 (citations omitted).

37. Here, Ms. Lowery Brown's jury venire ultimately consisted of thirty-six potential jurors, including six members of minority races. The petit jury would include only one member of a minority group.

38. Of the five peremptory jury strikes that the Commonwealth exercised at the time of jury selection, the Commonwealth utilized each and every one of its strikes to remove from the jury venire a member of a minority group. The Commonwealth struck a man of Asian descent (Juror 27), a woman of Vietnamese descent (Juror 12), a woman of Mexican descent (Juror 3), and two women of African American descent (Juror 2 and Juror 15). All five prosecution strikes were directed at individuals from minority groups, including the only two African American women.

39. Ms. Lowery Brown made a prima facie showing of purposeful racial discrimination at the time of jury selection, demonstrating that she is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove two jurors of Ms. Lowery Brown's race, and that other relevant circumstances combine to raise an inference that the prosecutor removed these jurors for racial reasons. See Commonwealth v. Edwards, 177 A.3d 963, 972 (Pa. Super. 2018) (recognizing the defendant's prima facie showing is the first in a three-step analysis under Batson). At the time of jury selection, the Court confirmed that Ms. Lowery Brown had made out a prima facie case of purposeful discrimination.

40. The second step under Batson is for the Commonwealth to provide a race-neutral explanation. Id. at 973. At this stage, the Commonwealth is not obligated to make a showing that is "persuasive, or even plausible," but rather must only provide a "race-neutral explanation." Id.

41. As to this second element, Ms. Lowery Brown's prosecutor suggested that Juror 2 was young and exhibited demeanor that suggested she was not interested in serving. (Compare Edwards, 177 A.3d at 973 (where the Commonwealth offered that the African American jurors were "nodding and making faces while the trial court discussed the credibility of police officers," failed to "identify the neighborhood in which [one of the stricken jurors] lived . . .

[or that] her ex-husband was a police officer . . . exhibited demeanor that made her appear disinterested in jury service).

42. As in Edwards, the Commonwealth's "race-neutral explanation" fails the third-prong under *Batson*, which requires the Court to evaluate the "persuasiveness of the facially-neutral explanation proffered by the Commonwealth . . .." Edwards, 177 A.3d at 973 (citations omitted).

43. "It does not take a statistician to understand that the probability of striking no Caucasians and striking" five of six minorities from the jury venire – including two of three African Americans and both African American women – "by random chance is extremely small." Id. at 976. Here, the prosecution used five peremptory strikes to reduce a jury venire that was comprised of 16.66% minorities by a factor of 6 times. The prosecution reduced the percentage of African Americans by a factor of 3 times.

44. As in Edwards, the totality of the circumstances demonstrates, for example, that the Commonwealth's race-neutral explanation for striking Juror 2 was pretextual and that the strike constituted purposeful racial discrimination.

45. In this case Ms. Lowery Brown was the target of a sting operation directed against the Black Democratic Caucus. Not only is Ms. Lowery Brown of African American descent from a largely African American district, but Agent Thomas – who was pulled out of the OAG's Education & Outreach division

for the purpose of managing Ali without any guiding protocol or information about Ali's crimes – was also African American. In addition, the Lifeline and Voter ID legislation at issue in this case were of unique interest to the African American community. Finally, as in Edwards, neither the Court nor the defense observed anything in Juror 2's demeanor that created a basis for a strike. Even assuming that Juror 2's demeanor suggested that she was not eager to serve, that hardly separates her from other, non-minorities in the jury venire. See, e.g., Edwards, 177 A.3d at 978.

46. The "persuasive value of the Commonwealth's explanation for striking" Juror 2 "is so low that, when combined with the other factors listed above, the totality of the circumstances indicates that the Commonwealth struck" Juror 2 "with discriminatory intent." Id.

WHEREFORE, the Commonwealth violated Ms. Lowery Brown right to Equal Protection of the Laws in striking members of her race from the jury, and Ms. Lowery Brown is thus entitled to have her judgment of sentence vacated and a judgment of acquittal entered in her favor.

III. VIOLATION OF EQUAL PROTECTION OF LAWS – SELECTIVE PROSECUTION

47. Vanessa Lowery Brown incorporates the allegations of paragraphs 1 through 46 as if set forth at length herein.

48. The Commonwealth's intentional disregarding of accepted protocols for conducting under cover criminal investigations created a culture among the members of the investigation to perpetuate selective investigation and prosecution of Ms. Lowery Brown and others.

49. CDAG Fina exercised ultimate control over the methods and direction of the investigation.

50. CDAG Fina demonstrated a bias against African-Americans and women. CDAG Fina sent racially charged and misogynistic emails to other members of the OAG before and during the criminal investigation of Ms. Lowery Brown.

51. Ali was originally charged and arrested by a seasoned criminal investigator with the OAG. Special Agent Gerard M. Brennan ("SA Brennan") was the affiant for all four criminal complaints against Ali. SA Brennan is a Caucasian. SA Brennan worked in the Pennsylvania OAG's Bureau of Criminal Investigation ("BCI"). In the capacity of a special agent for the BCI, SA Brennan followed Directive 512 whenever conducting criminal investigations using confidential informants. In conducting investigations involving confidential informants SA Brennan would have relied upon Directive 512 to exercise controls which are intended to prevent entrapment and selective prosecution.

52. Ali was initially charged by Senior Deputy General John Flannery who was working in conjunction with SA Brennan.

53. Ali was criminally charged with several hundred crimes on April 1, 2009.

54. Ali and his private lawyer sought to mitigate Ali's exposure to incarceration by offering to cooperate against public officials. Ali and his private lawyer solicited the OAG and CDAG Fina on several occasions in 2009.

55. CDAG Fina decided in late 2009 to offer Ali the opportunity to cooperate against others, and authorized Ali to become an active cooperator for the OAG.

56. CDAG Fina in 2010 removed SA Brennan from the active management of Ali. CDAG Fina substituted SA Brennan with Agent Thomas, an African American. Agent Thomas was not in the BCI. Agent Thomas was serving in a non-investigative section of the OAG – Education and Outreach.

57. CDAG Fina rationalized that if he reassigned Agent Thomas from Education and Outreach to a criminal investigation, Agent Thomas would not be bound by established protocols of the OAG regarding use of confidential informants. As the Chief Deputy Attorney General for the Pennsylvania Office of Attorney General, Mr. Fina exercised his authority by disregarding the safeguards instituted as an agency to prevent entrapment and selective prosecution.

58. CDAG Fina's actions did not simply disregard the important rules guiding the Agency's personnel in the use of cooperating witnesses in undercover investigations. CDAG Fina's decision to directly and personally control Agent Thomas' criminal investigation also bypassed the OAG's structure of supervision of agents. Specifically, the structure of the OAG provides for supervising agents to monitor the actions of agents directly handling the cooperating witness. CDAG Fina's decision to take Agent Thomas out of Education and Outreach and to exclusively supervise Agent Thomas himself meant that CDAG Fina deprived the investigation of the written protocol safeguards, as well as, the important management review of the conduct of the case agent by experienced agents familiar with the accepted protocols for the use of undercover cooperating witnesses.

59. The testimony of CDAG Fina and Agent Thomas confirm that not only were protocols disregarded, but that Ali was permitted to posit himself as a "lawyer" who owned "Cambria Law Center." As detailed above, Ali was encouraged to have constant unmonitored contact with the target of the investigation, Ms. Lowery Brown. Ali was permitted to develop an improper relationship with the target which was founded upon discouraged methods such as financial pressures, legal advice, flirtatiousness and personal discussion of the target's most intimate confidences.

60. Ali was directed by CDAG Fina towards members of the House Black Democratic Caucus. So much so that the Ali contacted an FBI handler to express concern that the investigation was improper because it targeted members of one political party over another.

61. Ali contacted FBI Special Agent Richard J. Haag ("SA Haag") in May 2011 – at the height of the undercover activity by Ali against Ms. Lowery Brown. SA Haag said that "Ali noted that PAGO [Pennsylvania Attorney General Office] seemed more interested with investigating Democrats than Republicans. Ali said he had taken initiative to contact Republican lobbyists or public officials to explore the possibility of developing them as potential targets. When he brought this to the attention of investigators he was told to cease immediately. Ali did not encounter such pushback when showing similar initiative with Democrats."

62. SA Haag under oath confirmed the accuracy of an email he wrote describing that Ali had actually spoken to OAG agents about his concerns of selective prosecution of Democrats: "[Ali] indicated that he had several discussions with at least two AG Agents about specifically targeting Democrats in the State legislature." SA Haag also wrote, "[Ali] was reprimanded for contacting the Republicans and told he was not to take any initiative in contacting Republicans in the future. [Ali] was encouraged to show initiative in contacting Democrats." Also, SA Haag said, "[Ali] has several conversations with [AG]

Agents about how management within the AG's office did not want him to get involved with Republicans."

63. "Though the vast majority of prosecutors are dedicated and able public servants who would never misuse their tremendous power, our legal system strives to prevent even the occasional injustice. Thus, the defense of selective prosecution provides a check upon the arbitrary exercise of governmental power. When all else has failed, an individual victimized by governmental wrath is still protected by judicial vigilance." Commonwealth v. Butler, 367 Pa. Super. 453, 533 A.2d 105 (Pa. Super. 1987).

64. The Commonwealth of Pennsylvania[1] violated Ms. Lowery Brown's guarantee of the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. The Commonwealth selected out Ms. Lowery Brown for criminal prosecution based upon the following illegal and unconstitutional bases: (i.) Ms. Lowery Brown was selected for prosecution because she is a Black American; and (ii.) Ms. Lowery Brown was selected for prosecution because she is a Democrat and exercised her First Amendment right of freedom of speech.

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[1] The use of "Commonwealth of Pennsylvania," "prosecution," or "government" refers to the law enforcement agencies which participated in the investigation and prosecution of Vanessa Lowery Brown. Those law enforcement agencies are as follows: the Pennsylvania Office of Attorney General, the Philadelphia County District Attorney's Office, the Dauphin County District Attorney's Office, and the Pennsylvania State Police. Federal law enforcement agencies did not directly participate in the prosecution of Ms. Lowery Brown.

65. The Fourteenth Amendment to the United States Constitution states, inter alia:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV

66. Prosecutions that are deliberately based on a defendant's race constitute equal protection violations. Wayte v. United States, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547 (1985). The standard for establishing selective prosecution is: first, others similarly situated were not prosecuted for similar conduct; and, second, the government's discriminatory selection of them for prosecution was based on impermissible grounds such as race or the exercise of a constitutional right. Commonwealth v. Mulholland, 549 Pa. 634, 649, 702 A.2d 1027, 1034 (1997).[2]

67. Prosecutorial discretion is broad, but it is not unfettered. Wayte v. United States, 470 U.S. 598, 608 (1985). "In particular," the Court said: "the decision to prosecute may not be 'deliberately based upon an unjustifiable standard

[2] See also In re Lokuta, 11 A.3d 427, 446-47 (2011); Commonwealth v. Olavage, 894 A.2d 808, 811 (Pa. Super. 2006); Commonwealth v. Celano, 717 A.2d 1071, 1074 (Pa. Cmmw. 1998).

such as race. . . [citations omitted] including the exercise of protected statutory and constitutional rights [citation omitted]." Id. (Emphasis added.)

68. In the investigation of Ms. Lowery Brown, the discriminatory purpose of the prosecution arises from both (1) the prosecutor supervising the investigation; and (2) the investigation which focused on Ms. Lowery Brown and several Black lawmakers.

69. On January 21, 2009, CDAG Fina sent an email to Jeff Crossland. CDAG Fina email of January 21, 2009 at 4:56 P.M. containing 22 attached images. CDAG Fina's message to Mr. Crossland was: "My favorite is Rainbows!" Id. at 1. See CDAG Fina email of January 21, 2009 at 4:56 P.M. containing 22 attached images; p. 1. CDAG Fina included two overtly racist emails. The first is image 11 which depicts a white male pushing two black men as the white man attempts to carry a bucket of Kentucky Fried Chicken. Id. at 12. See CDAG Fina email of January 21, 2009 at 4:56 P.M. containing 22 attached images; p. 12. The second depicts a Black man showing a shocked face as someone else appear to be catching a bucket of Kentucky Fried Chicken. See Id. at 21. ADA Fina email of January 21, 2009 at 4:56 P.M. containing 22 attached images; p. 21.

70. CDAG Fina described these images in a pleading he authorized as "some of these emails were offensive, irreverent and in bad taste, there was

nothing illegal in their content." See Noonan, et al. v. Kane et al., 2:15-CV-6082-HB (E.D. Pa.), Doc. 1, ¶ 19.

71. "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with and evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Yick Wo, 118 U.S. at 373-74.

72. CDAG Fina and the OAG targeted the investigation at Ms. Lowery Brown, a member of the Democratic Black Caucus, even though the Commonwealth had no evidence of wrongdoing by her.

73. The evidence is overwhelming that the government, and, in particular, CDAG Fina – the supervisor of the investigation – selected a particular course of action because of its adverse effects upon an identifiable group: the Black Caucus and members of the Democratic Party. Wayte, 470 U.S. at 610.

74. The second prong of the equal protection analysis requires that the defendant show that other similarly situated individuals could have been, but were not, prosecuted. United States v. Armstrong, 517 U.S. 456, 470 (1996); see also Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (selective prosecution of Chinese laundry owners violated equal protection because similarly situated non-

Chinese laundry owners were not arrested or prosecuted). See also United States v. Hoover, 727 F.2d 387, 389 (5th Cir. 1984); United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983); United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987) (evidence that the government targeted members of an African-American political organization established "colorable entitlement" to a selective prosecution defense).

75. In 2011, there were 84 Democrats and 119 Republicans in the Pennsylvania House; and 19 of the House Democrats were Black. Six of the Black Democrats were women. Fifty percent of the Black females in the House in 2011 were targeted and criminally prosecuted. No Caucasian men or women were targeted or charged.

76. Directing the scope of the investigation to the Black Caucus without predicate while not pursuing any of the over 200 Causasian legislators who were similarly situated to those in the Black Caucus is evidence of government actors unconstitutionally targeting individuals based upon race. "Thus, the defense of selective prosecution provides a check upon the arbitrary exercise of governmental power. When all else has failed, an individual victimized by governmental wrath is still protected by judicial vigilance." Commonwealth v. Butler, 367 Pa. Super. 453, 533 A.2d 105 (Pa. Super. 1987); see also Commonwealth v. Bomar, 826 A.2d 831, 861 (Pa. 2003); Armstrong, 517 U.S. at

470 (evidence of similarly situated members of other races). The artificial limitation is race-based selective prosecution. Hunter v. Underwood, 471 U.S. 222, 229-31 (1985) (convincing direct evidence that the State had enacted a provision for the purpose of disfranchising blacks). Additionally, all of those targeted by Ali were Democrats.

77. "Prosecutorial discretion is an awesome power which our society necessarily vests in certain public servants. Those persons may destroy lives and cause financial ruin by virtue of mistake judgment. An innocent person who has been charged with a crime may be found not guilty but nonetheless find their life shattered. An individual of ordinary means must deplete their entire net worth to defend against limitless resources of the government. A lifetime of work and thrift will be extinguished whether the person is innocent or not. The community remembers the charge, not he acquittal." Commonwealth v. Butler, 533 A.2d 105 (Pa. Super. 1987).

78. Ms. Lowery Brown was corruptly targeted because she was a member of the Black Democratic Caucus.

79. "The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. The imprisonment of

the petitioners is therefore illegal, and they must be discharged." Yick Wo, 118 U.S. at 374, 6 S. Ct. at 1073.

80. It is respectfully submitted that the Court should dismiss the criminal charges against Ms. Lowery Brown on the basis of illegal selective prosecution.

WHEREFORE, because Ms. Lowery Brown's right to equal protection of the laws was violated by selective prosecution, she is entitled to have her judgment of sentence vacated and a judgment of acquittal entered in her favor.

IV. VIOLATION OF CONSTITUTIONAL RIGHT TO A CONFLICT FREE PROSECUTION

81. Vanessa Lowery Brown incorporates the allegations of paragraphs 1 through 80 as if set forth at length herein.

82. A citizen in Pennsylvania has a "constitutional right to an impartial prosecutor." See Commonwealth v. Eskridge, 604 A.2d 700, 702 (Pa. 1992). In an Order dated November 27, 2017, this Court ruled that Vanessa Lowery Brown's prosecutors suffered disabling conflicts of interest and disqualified Brad Bender and Mark Gilson (the "Conflicted Line Prosecutors").

83. The Conflicted Line Prosecutors were not only full-time employees of the Philadelphia District Attorney's Office at all relevant times

("PDAO"),[3] but they also were deputized as "special assistants to assist" the Dauphin County District Attorney in prosecuting Ms. Lowery Brown. See 16 P.S. § 1420(a).[4]

84. Since the initiation of criminal charges against Ms. Lowery Brown, the Conflicted Line Prosecutors acted under the joint supervision, statutory

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[3] The District Attorney and Acting District Attorney for Philadelphia County, who (jointly with the Dauphin County District Attorney's Office) supervised the prosecution of Ms. Lowery Brown, possessed conflicts of interest that disable the entire prosecution. The Philadelphia District Attorney had an undisclosed conflict of interest in prosecuting Ms. Lowery Brown as he had an attorney-client relationship with the lawyer for the government's chief cooperating witness. Additionally, the Acting Philadelphia District Attorney was a partner in the law firm that represented the chief government witness during that witness's active cooperation against Ms. Lowery Brown. She also did not disclose this conflict of interest to Ms. Lowery Brown. The Dauphin County District Attorney's Office does not dispute knowledge of the Acting District Attorney's conflict of interest. See Tr. of Proceeding on Motion to Disqualify Prosecutors Vol. I (Oct. 5, 2017) p. 70, ll. 9-11.

[4] In addition to the Dauphin County District Attorney's Office's statutory authorization for all filings and actions of the Conflicted Line Prosecutors in the handling of this case, the First Assistant District Attorney for Dauphin County himself filed the Commonwealth's Motion to Dispose of Omnibus Pretrial Motion on June 30, 2016. In the filing, the Dauphin County District Attorney's Office does not distance itself from the positions taken on issues such as selective prosecution on the basis of race and party affiliation and entrapment by the Conflicted Line Prosecutors, but rather the Dauphin County District Attorney's Office seeks disposition where the Commonwealth (acting through a conflicted prosecution) sought denial of Ms. Lowery Brown's Omnibus Pretrial Motion. This is manifested coordination by the Dauphin County District Attorney's Office with the Conflicted Line Prosecutors in the prosecution of Ms. Lowery Brown. Moreover, on October 5, 2017, during undersigned counsel's examination of Acting District Attorney Kathleen Martin as to whether she authorized the Conflicted Line Prosecutors to contact undersigned counsel on April 5, 2017 and offer a reduced plea resolution for Ms. Lowery Brown, the First Assistant District Attorney of Dauphin County objected "because she [Ms. Martin] wouldn't have any authority to do that." See Tr. of Proceeding on Motion to Disqualify Prosecutors Vol. 1 (Oct. 5, 2017) p. 85, ll. 4-13. The First Assistant District Attorney for Dauphin County argued to this Court that the Dauphin County District Attorney's Office had authority over the Conflicted Line Prosecutors. And nonetheless, the Commonwealth (acting by the Conflicted Line Prosecutors) offered a reduced plea on April 5, 2017 in an effort to resolve this case.

authority and control of the PDAO and the Dauphin County District Attorney's Office ("DCDAO").

85. As a matter of law, the Conflicted Line Prosecutors could not prosecute Ms. Lowery Brown in Dauphin County acting under the legal authority of the PDAO. The Commonwealth's power to prosecute Ms. Lowery Brown in Dauphin County is vested in the DCDAO, and so the Conflicted Line Prosecutors were deputized as "special assistants" to the Dauphin County District Attorney, served under his statutory authority and supervision, and consistently filed all the pleadings in this case under District Attorney Edward M. Marsico, Jr.'s name and the authority of the DCDAO. See 16 P.S. § 1420(a).

86. For these reasons, Ms. Lowery Brown's constitutional right to an impartial prosecutor obligated this Court to disqualify not only the Conflicted Line Prosecutors, but also the DCDAO.

87. Ms. Lowery Brown filed a motion to disqualify her prosecutors and for dismissal based, inter alia, upon her constitutional right to an impartial prosecutor. See Commonwealth v. Eskridge, 604 A.2d 700, 702 (Pa. 1992).

88. In its November 27, 2017 Order, this Court ruled that Ms. Lowery Brown's prosecutors suffered disabling conflicts of interest.

89. A conflicted prosecutor may take no action but to refer the case to the Office of Attorney General. See Commonwealth v. Breighner, 684 A.2d

143, 147 (Pa. Super. 1996). The Commonwealth disregarded this requirement here, and the Conflicted Line Prosecutors advanced this case for years under the joint authority and supervision of the Philadelphia County and Dauphin County District Attorney's Office.

90. As for the requirement that prosecution conflicts must be referred to the Office of Attorney General, Ms. Lowery Brown's case is unique. Before the DCDAO filed the current charges against Ms. Lowery Brown, the Office of Attorney General exercised prosecutorial discretion and publicly declined charges against Ms. Lowery Brown, calling the investigation "poorly conceived, badly managed, and tainted by racism . . . ."[5]

91. This Honorable Court confirmed at sentencing that the Dauphin County District Attorney's Office did not run this investigation until the Philadelphia District Attorney's Office and its prosecutors were disqualified. The Court expressed relief that this "troubling" investigation was handled outside of Dauphin County, and the Court lauded the Dauphin County District Attorney's Office for how it assumed the case at the time of trial.

92. Under the circumstances of this case, Ms. Lowery Brown's constitutional right to an impartial prosecutor compels that the judgment of

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[5] See Angela Couloumbis and Craig McCoy, Kane Shut Down Sting that Snared Philadelphia Official, PHILLY.COM, Mar. 17, 2014.

sentence must be vacated and that a judgment of acquittal should be entered in her favor.

WHEREFORE, Ms. Lowery Brown respectfully requests that this Honorable Court vacate her sentence and that a judgment of acquittal should be entered in her favor.

V. THE JURY'S VERDICT WAS AGAINST THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE

93. Vanessa Lowery Brown incorporates the allegations of paragraphs 1 through 90 as if set forth at length herein.

94. The Due Process Clause of the United States Constitution provides that no criminal conviction may occur "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." In re Winship, 397 U.S. 358, 364 (1970).

95. The recent landmark unanimous decision by the United States Supreme Court in McDonnell v. United States, __ U.S. __, 136 S. Ct. 2355 (2016) is applicable to the Counts alleging conflict of interest (Counts 1-5) and the count of bribery in official and political matters (Count 6). In McDonnell, the Supreme Court considered what is required to obtain a conviction of a public official under a

bribery theory. To establish that a public official committed bribery,[6] the government is required to show that the public official committed an "official act" in exchange for receiving something of value. In McDonnell, the Supreme Court defined the Constitutional limits of "official act," holding that:

> an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official. To qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so.

McDonnell, 136 S. Ct. at 2371-72. The Supreme Court rejected the government's argument for a broad interpretation of "official act" and instead adopted a limited interpretation. Crucially, **[s]etting up a meeting, talking to another official, or**

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[6] Governor McDonnell was charged with one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, and two counts of making a false statement. 18 U.S.C. § 1343, 1349 (honest services fraud); 18 U.S.C. § 1951 (a) (Hobbs Act extortion); § 1014 (false statement). McDonnell, 136 S. Ct. at 2365. The honest services fraud was defined using the federal bribery statute, 18 U.S.C. § 201. Id.

organizing an event (or agreeing to do so)—without more—does not fit that definition of "official act." Id. at 2372. (emphasis added)

96. On the heels of the decision in McDonnell, the Pennsylvania Supreme Court, in Commonwealth v. Veon, considered the limits of the Pennsylvania Conflict of Interest Statute, 65 Pa. C.S.A. § 1103. 637 Pa. 442, 150 A.3d 435 (2016). The court did not consider what constitutes an "official action," but rather considered what constitutes "private pecuniary gain." In rejecting the trial court's "unduly broad" interpretation of the definition of "private pecuniary gain," the Supreme Court's opinion, authored by Justice Wecht, makes considerable citation to and carefully evaluates McDonnell. Justice Wecht wrote as follows:

> In a recent case **presenting some of the same concerns that we confront here**, the Supreme Court of the United States noted that 'a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.' McDonnell v. United States, ____U.S. ____, 136 S. Ct. 2355, 2373, 195 L. Ed. 2d 639 (2016) (quoting United States v. Sun–Diamond Growers of Cal., 526 U.S. 398, 408, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999)). The trial court's jury instruction here made of the statute a meat axe, finding (or creating) a conflict of interest on every dais, at each parade, and at every ribbon-cutting, given that the very nature of seeking to satisfy one's constituents and secure re-election all but requires the taking of official action to secure intangible political gains. This criminalization of politics is a bridge too far.

Veon, 150 A.3d at 435, 447-48 (emphasis added).

97. While the Pennsylvania Supreme Court in Veon did not apply McDonnell directly to the definition of "official action" in the Conflict of Interest Statute (because that element of the jury charge was not at issue) it is plain to see that the court cited McDonnell favorably for the proposition that broad, expansive interpretations of the Pennsylvania Conflict of Interest statute are "a bridge too far."

98. The Commonwealth offered insufficient evidence at trial and the jury's verdict of guilty was against the weight of the proffered evidence such that the judgment of sentence should be vacated.

99. The evidence presented by the Commonwealth was insufficient to prove beyond a reasonable doubt that Ali's five cash payments to Ms. Lowery Brown were given in exchange for specific official action.

100. In Counts 1-5, the Commonwealth alleges that Brown committed a conflict of interest in violation of 65 Pa. C.S.A. § 1103(c). In relevant part, that statute provides:

> No public official, public employee or nominee or candidate for public office shall solicit or accept anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment, based on any understanding of that public official, public employee or nominee that the vote, official action or judgment of the public official or public employee or

nominee or candidate for public office would be influenced thereby.

65 a. C.S.A. § 1103(c).[7]

101. In relevant part, Counts 1-5 allege that, "[o]n or about February 11, 2011, February 14, 2011, March 9, 2011, April 22, 2011 and May 23, 2011, and various dates thereafter, in Dauphin County and in other locations within Pennsylvania, the above named defendant, a public official or public employee, did engage in conduct that constitutes a conflict of interest . . . [when she] did accept a cash payment in exchange for her consideration and promises to use her public office . . . to perform official actions on behalf of the person(s) who provided the cash payment . . . ." (See Criminal Information at Counts 1-5.)

102. The Commonwealth failed to identify a "vote, official actions or judgment of the public official . . ." pending before Ms. Brown on the foregoing dates as required by 65 Pa. C.S.A. § 1103(c). Rather, the audio recordings entered into evidence by the Commonwealth reflect the following:

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[7] The Pennsylvania Conflict of Interest statute is likewise substantially similar to the federal bribery statute considered by the Supreme Court in McDonnell. In order for a violation of Section 1103(c) to occur, a public official must accept something of monetary value in exchange for being influenced regarding a "vote, official action or judgment." 65 Pa. C.S.A. § 1103(c). Thus, Section 1103(c) explicitly requires that the pecuniary benefit is received by the public official in order to influence the performance of an official action, vote, or judgment. Therefore, the Supreme Court's pronouncement in McDonnell should be applied to all charges brought pursuant to 65 Pa. C.S.A. § 1103(c) in order to protect the due process rights of Pennsylvania defendants.

a. The February 11, 2011 meeting between Ali and Ms. Lowery Brown confirms that there was no explicit understanding that Ms. Brown would be influenced with respect to a specific vote, official action or judgment in exchange for the February 11, 2011 payment. Ms. Lowery asked Ali directly, and he refused to answer, "I like to slow walk stuff."

b. The February 14, 2011 meeting between Ali and Ms. Lowery Brown confirms that there was no explicit understanding that Ms. Lowery Brown would be influenced with respect to a specific vote, official action or judgment. Rather, Ali stated, "we've got two projects and I would like you to be one of the sponsors. I will have the details probably on Friday . . . ." But Ali provided no information as to either of the alleged projects. Later in the conversation, Ali mentioned three different issues, but again, provided no specificity concerning what official action he wished for Ms. Brown to undertake. Specifically, Ali stated, "[b]ut what I'm saying to you is that there is an opportunity there for the liquor piece, the non-profit piece, the Marcellus Shale issue." (Id. at 8.) This is woefully insufficient evidence to prove Count 2 beyond a reasonable doubt. Simply mentioning broad topics that may potentially come before the Legislature or stating that Ms. Brown may be asked to sponsor some unknown piece of legislation at a future date cannot satisfy the Commonwealth's burden of proof with respect to 65 Pa. C.S.A. § 1103(c).

c. The March 9, 2011 meeting establishes that Ms. Brown did not accept a payment "based on any understanding . . . that the vote, official action or judgment of [Ms. Brown] would be influenced thereby." 65 Pa. C.S.A. § 1103. Rather, Ms. Brown asked Ali, "[w]hat do you need me to do?" In response Ali stated, "**I don't need you to do anything**." (*Id.*) at 4 (emphasis added).

d. The April 22, 2011 meeting confirms that Ali raised the issue of a "Telecom" bill—i.e., the "Lifeline Bill"—with Ms. Brown. During the relevant exchange, Ali was so

focused on entrapping Ms. Lowery Brown that he perceived her position on the bill and would not say that he wanted her to vote against Lifeline. **"I didn't say that I wanted you either way.** I am just saying, I may need your support. Can I count on you?" Ms. Brown, on the other hand, clearly let Ali know that she had already decided which side of the issue she was on.[8] This exchange, where Ali did not ask Ms. Brown to take a specific action with respect to the Lifeline Bill, and where Ms. Brown clearly let Ali know that she would not vote against the Lifeline Bill, cannot be sufficient to establish a violation of 65 Pa. C.S.A. § 1103.

e. The May 23, 2011 meeting saw Ali asking Ms. Lowery Brown to vote "no" with respect to the so-called Voter ID law. In making this request, Ali only requested that Ms. Brown vote in a way that he knew she was already prepared to vote. Ms. Brown's sworn grand jury testimony on December 5, 2014 confirms that it was always her intention

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[8] The December 5, 2014 grand jury testimony entered into evidence by the Commonwealth is yet another demonstration of how decisive and predetermined Ms. Brown's official position on the Lifeline legislation was—before Ali ever broached the topic.

A Lifeline is a service underprivileged people are able to access to have a telephone.
Q People who normally wouldn't be able to afford it would get some sort of Government funding for it?
A Yes
Q And, obviously, given the area that you represent, you have a lot of constituents who would be eligible?
A They are heavily relying on that service, yes.
Q So your position on any legislation I imagine that would have touched on that area would have been to support it?
A Absolutely.
Q You made that position very well-known in fact –
A I wrote a letter to the government.
***
Q Do you remember already telling him that you had stated your position in writing[?]
A Right.

to vote no on the Voter ID bill.[9] Thus, Ali did not ask Ms. Brown to do anything different than what she was already prepared to do and thus, there was no understanding that the payment would influence her vote.

103. Because the Commonwealth has not shown evidence that any of the five cash payments at the heart of this case were a direct exchange for a "vote, official actions or judgment of" of Ms. Brown in her capacity as a state representative, the Commonwealth offered insufficient evidence on Counts 1-5 and the jury's verdict was against the weight of the offered evidence.

104. In Count 6, the Commonwealth alleges that Ms. Brown committed bribery in official and public matters in violation of 18 Pa. C.S.A. § 4701(a)(1). (See Criminal Information at Count 6.) The Commonwealth alleges that the Ms. Brown "accepted five cash payments totaling $4,000 as consideration for her decision, opinion, recommendation, vote or other exercise of discretion as a

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[9] Q All right. We want – the jurors – you are under oath, so you have to tell us, we want a truthful answer to this question. We know you voted "no" on the identification bill and you weren't asked to vote any differently by Ali and you were paid for your vote. But if we could go back in time and if he told you, Vanessa, I need a 'yes' vote on this, and he gives you $2,000 for it and he has already given you $2,000 before that, would you have voted "yes"?

A No. Honestly, no.

Q So did that make it easier in a sense for you to take that money because you were asked to do things that you would have done anyway?

A Absolutely.

public servant" in violation of 18 Pa. C.S.A. § 4701(a)(1). That statute provides, inter alia, that:

> A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> > (1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient.

18 Pa. C.S.A. § 4701(a)(1).[10]

105. The five payments that the Commonwealth alleges that Ms. Brown accepted were provided by Ali on February 11, 2011, February 14, 2011, March 9, 2011, April 22, 2011, and May 23, 2011. As set forth above, the evidence presented by the Commonwealth with respect to each of these dates confirms the absence of agreement to take official action.

106. In addition to the absence of official action on the payment dates, the Commonwealth also entered into evidence two meetings that were

[10] The Pennsylvania statute for bribery in official and political matters, like the federal statute at issue in McDonnell, requires that a public official receive a pecuniary benefit in exchange for a "decision, opinion, recommendation, vote, or other exercise of discretion" of that official. In other words, conviction under 18 Pa. C.S.A. § 4701(a)(1) is contingent upon a public official receiving a pecuniary benefit in exchange for the performance, or agreement to perform "an official act." Because the federal bribery statute and the Pennsylvania bribery statute are so similar, the Supreme Court's pronouncement in McDonnell should be applied to all charges brought pursuant to 18 Pa. C.S.A. § 4701(a) in order to protect the due process rights of Pennsylvania defendants.

arranged by Ms. Brown in an attempt to establish that she took official action in exchange for cash payments from Ali. The first involves setting up a meeting among Thomasine Tynes, Ali and Ms. Brown. (See Ex. " " at 36-40.) But this is precisely the type of conduct that is insufficient to constitute "official action" after McDonnell. See McDonnell, 136 S. Ct. at 2372 ("[s]etting up a meeting, talking to another official, or organizing an event . . . does not fit that definition of "'official act.'")

107. The second meeting set up by Ms. Brown that was entered into evidence by the Commonwealth as constituting proscribed official action was that involving a group of women legislators. (See Ex. F at 40-42.) But here again is precisely the type of conduct which is plainly lawful under McDonnell.

108. The final instance of alleged official conduct that the Commonwealth has entered into evidence involves the issue of Ms. Brown's official position on the privatization of liquor stores in Pennsylvania. In a recorded meeting between Ali and Ms. Brown on March 18, 2011, Ms. Brown stated that she "would be safe to cross over[.]" This statement, however, is not sufficient to establish an agreement to perform an official action, vote, judgment, decision, opinion, recommendation, or other exercise of discretion. In actuality, a vote did not come up on this bill until two years after the discussion with Ali and Rep. Brown voted against it.

109. Plainly, the Commonwealth failed to establish that on any of these dates, Ms. Brown accepted a pecuniary benefit as consideration for a specific decision, opinion, recommendation, vote or other exercise of discretion as a public servant.

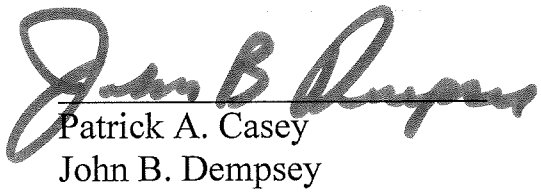
110. Based upon the statutory language of 18 Pa. C.S.A. § 4701(a) and the Supreme Court's pronouncement in McDonnell, the Commonwealth failed to establish that on any date, Ms. Lowery Brown committed bribery in official and public matters and she must, therefore, be acquitted of Count 6.

111. As to Count 7, the Commonwealth offered into evidence as "Commonwealth Exhibit 6" a copy of Ms. Lowery Brown's amended State of Financial Interest for the year 2011, dated January 13, 2017.

112. Because the Commonwealth offered evidence that Ms. Lowery Brown did file a Statement of Financial Interest for the year 2011, the Commonwealth's evidence was insufficient on Count 7, and the jury's verdict that Ms. Lowery Brown did not file a Statement of Financial Interest for the year 2011 was against the weight of the evidence.

WHEREFORE, for all of the foregoing reasons, Ms. Lowery Brown is entitled to an Order vacating her sentence and that a judgment of acquittal should be entered in her favor.

Respectfully submitted,



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Scranton, PA 18503
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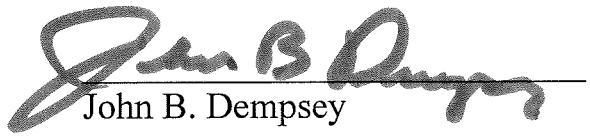
Date: December 10, 2018

CERTIFICATE OF COMPLIANCE

I, John B. Dempsey, hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently from non-confidential information and documents.



John B. Dempsey

Date: December 10, 2018

CERTIFICATE OF SERVICE

I, Patrick A. Casey, hereby certify that a true and correct copy of the foregoing Post-Sentencing Motion was served upon the following counsel of record via hand-delivery on this 10th day of December 2018:

Francis T. Chardo, Esquire
Michael A. Sprow, Esquire
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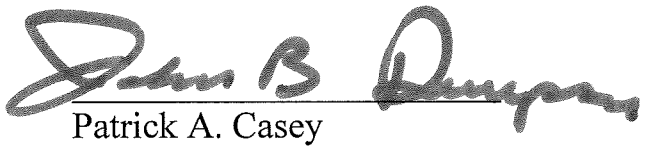

Patrick A. Casey

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**No. CP-22-CR-525-2015**
	:	
VANESSA LOWERY BROWN	:	

ORDER

AND NOW, on this ____ day of _____ 2018, upon consideration of Defendant Vanessa Lowery Brown's Post-Sentencing Motion, IT IS HEREBY ORDERED THAT the Motion is GRANTED.

_____
J.